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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT
PETITION OF:

GARY MEREDITH,

Petitioner.

NO. 46671-6-II

STATE'S SUPPLEMENTAL
RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed where the petitioner cannot show actual prejudice to a constitutional right?
2. Does the petition demonstrate deficiency of counsel or prejudice in conducting the trial?
3. Was the closing argument of the prosecuting attorney proper?
4. Is the issue of peremptory challenges of a constitutional nature, and if so, is it structural error?
5. Does the petitioner demonstrate court error in deciding the exercise of peremptory challenges?

1 6. Where the petitioner chose not to challenge three specific jurors; but instead
2 excused three other jurors, can he show that he was actually prejudiced by
3 the absence of an eighth peremptory challenge?

4
5 B. STATEMENT OF THE CASE:

6 The petitioner has filed two documents, both entitled Personal Restraint Petitions.
7 Some confusion arose because the documents do not state that one is supplemental to the
8 other. The State's previous response addressed the petitioner's second, presumably up-to-
9 date, filing. Apparently that was a supplemental, not an amended, brief. The State
10 incorporates that response into the present one.

11 The basic facts in this case are quite straightforward. The facts can be found in the
12 unpublished part or the slip opinion of the petitioner's direct appeal. *See State v. Meredith*,
13 163 Wn. App. 75, 259 P. 3d 324 (2011):

14 About two weeks before BL (age 12) was raped, AB (age 13) met Meredith.
15 During those two weeks, Meredith talked daily with AB by phone. Meredith
16 told AB that he was 17 years old, when in reality he was 24 years old. At
17 one point, Meredith told AB that he liked her, but AB reported that she did
18 not think much of his feelings because, as she had told him, she already had
19 a boyfriend.

20 On the night of October 28, 1994, AB, BL, and ST (age 13) stayed the night
21 at MJ's (age 13) house. AB spoke to Meredith. Meredith said that he wanted
22 to meet AB's friends.

23 The next day, the four girls met Meredith and his friend, Jason Gross, and
24 the group went to the mall. Afterward, Gross and Meredith dropped the girls
25 off near MJ's house. AB arranged to meet Meredith again that same evening.
26 AB and the three other girls met Meredith and Gross near BL's house that
27 evening, and Gross drove everyone to Meredith's apartment, stopping on the
28 way to buy some alcohol.

29 Once inside Meredith's apartment, all four girls consumed varying amounts
30 of alcohol. MJ and BL reported that they felt intoxicated. BL started feeling

1 sick, so she went into a bedroom to lie down. Meredith followed her into the
2 bedroom and closed the door.

3 Slip Op.; Appendix J.

4 The record provides additional details of the incident. The victim, BL, testified that
5 Meredith took her clothes off, got in bed with her, and asked her if she wanted to have sex.
6 4 RP 279. Meredith then took his clothes off and got on top of BL. *Id.* Meredith began
7 having vaginal intercourse with her. 4 RP 280, 281.

8 MJ testified that she looked into the bedroom. 3 RP 150. She saw the petitioner on
9 top of BL. 3 RP 151. The petitioner was naked and moving on top of BL. 3 RP 152. She
10 saw them having sexual intercourse. 3 RP 150.

11 AB testified that she also looked into the bedroom. She saw the petitioner and BL
12 naked in bed. 5 RP 386, 387. BL was on her back and the petitioner was on top of her. *Id.*

13 Jason Gross testified that BL went in the bedroom and laid down. 6 RP 529. Over
14 the course of the evening, the petitioner and others went in and out of the bedroom, also. 6
15 RP 529-530. Gross observed that the girls were "little kids". 6 RP 533. The petitioner
16 bought the girls alcohol and gave it to them. 6 RP 534. The petitioner admitted to Det.
17 Goetz that the four teenaged girls were at his apartment on the night in question. 4 RP 231.

18 Later that day, BL confessed to her mother what had happened. Dr. Bobbi Sipes
19 inspected BL's vagina, noting a "pooling of secretions" in the back portion of her vagina. 6
20 RP at 498. It was semen. 6 RP 501, 566. She also saw redness on BL's thigh and a
21 superficial laceration in the area between BL's vagina and anus, consistent with sexual
22 intercourse. 6 RP 500.

1 C. ARGUMENT:

2 1. THE PETITION FAILS TO DEMONSTRATE DEFICIENCY OF
3 COUNSEL OR PREJUDICE IN CONDUCTING THE TRIAL.

4 Under the umbrella of a claim of ineffective assistance of counsel, the petitioner re-
5 argues evidentiary issues previously heard and rejected on appeal. As a general rule,
6 "collateral attack by [personal restraint petition] on a criminal conviction and sentence
7 should not simply be a reiteration of issues finally resolved at trial and direct review, but
8 rather should raise new points of fact and law that were not or could not have been raised
9 in the principal action, to the prejudice of the defendant." *In re Personal Restraint of*
10 *Gentry*, 137 Wn.2d 378, 388-389, 972 P.2d 1250 (1999). The petitioner in a PRP is
11 prohibited from renewing an issue that was raised and rejected on direct appeal unless the
12 interests of justice require relitigation of that issue. *In re Personal Restraint of Lord*, 123
13 Wn.2d 296, 303, 868 P.2d 835 (1994); *see also Gentry*, at 388.

14 Strictly speaking, the petitioner is not barred from raising these evidentiary issues
15 again in the context of ineffective assistance of counsel. However, he must demonstrate
16 that he "lost" these issues at trial due to the deficiency of counsel, and prejudice; i.e. that
17 but for counsel's deficiency, the issue would have been decided in the petitioner's favor
18 and that the result of the trial would have been different – he would have been acquitted.
19 *See State v. McFarland*, 127 Wn.2d 322, 333-334, 899 P. 2d 1251 (1995). In light of the
20 evidence in this case, as recognized in the direct appeal by the Court of Appeals, this is
21 indeed a strenuous burden for this petitioner.

22 a. Nurse examination with the "blue light".

23 The petitioner now faults trial counsel for failing to make an offer of proof
24 regarding cross-examination of Nurse Russel regarding the use or conclusions from use of
25 an instrument called a "blue light." At trial, defense counsel argued the relevance of his

1 cross-examination at length. 5 RP 434-436. The petitioner raised the issue in the direct
2 appeal. Slip Op. The Court of Appeals found, even if error, it was harmless where there
3 was overwhelming evidence of sperm in the victim's vagina. *Id.* Thus, even if defense
4 counsel was deficient in failing to convince the court, there was no prejudice. In his PRP,
5 the petitioner acknowledges that his argument is speculative, stating that "It is impossible
6 to know ..." its importance to the defense. Pet., at 3.

7
8 b. Potential DNA testing of vaginal swabs.

9 Likewise the petitioner faults his trial counsel for failing to convince the trial court
10 to permit cross examination regarding the purpose of the vaginal swabs, specifically for
11 DNA testing. This topic was a difficult, but tactical choice for counsel. If the DNA testing
12 was not done, counsel could criticize law enforcement for an incomplete investigation. On
13 the other hand, considering that witnesses saw the petitioner having sexual intercourse with
14 the petitioner, defense counsel risked the likely outcome that the DNA test would have
15 removed any and all doubt that the petitioner had sexual intercourse with the victim.

16 The Court of Appeals also addressed the DNA test issue. Again, the Court upheld
17 the decision of the trial court. Slip Op., at xx. The Court went on to find that even if error,
18 it was harmless in the face of overwhelming evidence of the identity of the petitioner as the
19 perpetrator. *Id.* This was a tactical choice by counsel. As such, it was not deficient. *See*
20 *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); *McFarland*, 127 Wn.2d at 336.

21 Even if counsel was somehow deficient in this tactical choice, the petitioner cannot
22 show prejudice. As pointed out above, even if the swabs had been examined for DNA, it
23 was likely that the results would have been evidence against him. Even if the DNA test
24 excluded him, it would not avail him, for the definition of "sexual intercourse" includes
25 penetration, but not ejaculation. *See* RCW 9A.44.010; *see also State v. Weaville*, 162 Wn.
App. 801, 813-814, 256 P. 3d 426 (2011).

1
2 2. THE CLOSING ARGUMENT OF THE PROSECUTING
3 ATTORNEY WAS PROPER.

4 The petitioner argues that the prosecuting attorney committed misconduct in
5 closing argument, and his attorney deficient for failing to object to the argument. Pet., at 6,
6 9. But, the prosecutor's argument was proper, so there was no reason for counsel to object.

7 Prosecutors have wide latitude to argue reasonable inferences from the facts and
8 evidence. See *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991). This is
9 certainly true concerning witness credibility. See *State v. Allen*, 176 Wn.2d 611, 631, 294
10 P.3d 679 (2013); *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

11 Prejudicial error will not be found unless it is clear and unmistakable that counsel is
12 expressing a personal opinion. *Allen*, at 631. To determine whether the prosecutor is
13 expressing a personal opinion of the defendant's guilt, independent of the evidence, the
14 Court views the challenged comments in context and looks for “clear and unmistakable”
15 expressions of personal opinion. *State v. McKenzie*, 157 Wn.2d 44, 53-54, 134 P.3d 221
16 (2006).

17 Here, as in many other cases, credibility of the witnesses was a central issue. The
18 prosecutor pointed out that the testimony of the four girls who were present in the
19 petitioner's apartment was consistent without being identical. 6 RP 568. The prosecutor
20 referred the jurors to the part of Instruction 1 that tells jurors what they may consider in
21 evaluating the credibility of witnesses. 6 RP 572-573.

22 At the end of the initial closing, the prosecutor addresses the issue of consent. 6 RP
23 574. He correctly points out that, legally, consent is irrelevant in this case. *Id.* Where the
24 prosecutor tells the jury that the petitioner is guilty, these statements are all conclusions
25 drawn from the evidence and the law. 6 RP 562, 568, 574. None can realistically be

1 described as his personal opinion, much less meet the required “clear and unmistakable”
2 standard.

3 In rebuttal, the prosecutor addressed the remarks of the defense regarding DNA
4 testing and evidence of identity. 6 RP 601. The prosecutor points out the same thing that
5 the Court of Appeals did in the direct appeal: that all of the witnesses testified that the
6 petitioner was present; and three testified that they saw the petitioner in bed or having
7 sexual intercourse with the victim. *Id.* Identity was not an issue in this case. Nor was the
8 issue whether, or what kind of, sperm - motile or non-motile - was in the victim’s vagina.
9 The only issue was whether the petitioner had sexual intercourse with the victim. The
10 overwhelming evidence was that he did.

11 To obtain relief in a PRP, the petitioner must show constitutional errors resulting in
12 actual and substantial prejudice or, for alleged nonconstitutional errors, a fundamental
13 defect that inherently results in a miscarriage of justice. *In re Personal Restraint of Cook*,
14 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Here, the petitioner must show that the closing
15 argument violated the Constitution and was solely responsible for the guilty verdict.
16 Likewise, he must show that his attorney was deficient and that, absent the deficient
17 performance, the petitioner would have been acquitted. The petitioner meets none of these
18 requirements.

19
20 3. THE ISSUE OF PEREMPTORY CHALLENGES IS NEITHER
21 CONSTITUTIONAL NOR STRUCTURAL.

21 Peremptory challenges of prospective jurors is a matter for individual states to
22 establish and limit. *See Rivera v. Illinois*, 556 U.S. 148, 151, 126 S. Ct. 1446, 173 L. Ed.
23 2d 320 (2009). There is no freestanding constitutional right to peremptory challenges. *Id.*,
24 at 157, citing *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33
25 (1992).

1 Trial court error in applying state-provided rules or statutes regarding peremptory
2 challenges, is not a violation of the United States Constitution. *Rivera*, at 158. “[A] mere
3 error of state law, is not a denial of due process.” *Id.*, citing *Engle v. Isaac*, 456 U.S. 107,
4 121, n. 21, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). “The Due Process Clause, our
5 decisions instruct, safeguards not the meticulous observance of state procedural
6 prescriptions, but “the fundamental elements of fairness in a criminal trial.” *Id.*, quoting
7 *Spencer v. Texas*, 385 U.S. 554, 563–564, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

8 In *Rivera*, the United States Supreme Court granted certiorari in order to discuss
9 and resolve the issue among several states whether the erroneous denial of a peremptory
10 challenge requires automatic reversal of a defendant's conviction under the Constitution.
11 The Court specifically cited the holding of *State v. Vreen*, 143 Wn.2d 923, 927–932, 26
12 P.3d 236 (2001) as one of the cases raising the issue. Because error regarding peremptory
13 challenges is not a due process or other constitutional issue, neither is it structural error.
14 *Rivera*, at 157.

15 *Vreen* held that the “erroneous denial of a litigant's peremptory challenge cannot be
16 harmless when the objectionable juror actually deliberates.” 143 Wn.2d at 932. The *Vreen*
17 holding is based upon application of federal cases interpreting the federal Constitution,
18 especially *United States v. Annigoni*, 96 F.3d 1132, 1144 (9th Cir. 1996). *See Vreen* at
19 929-931. But the reasoning and automatic reversal rule espoused in *Annigoni* was rejected
20 and effectively overruled by *Rivera*. The Washington and federal constitutions are co-
21 extensive regarding due process. *See e.g. State v. Manussier*, 129 Wn.2d 652, 921 P.2d
22 473(1996). Therefore, Washington follows the United States Supreme Court when applying
23 the due process and jury trial provisions of the respective constitutions. For this reason, the
24 petitioner’s reliance on *Vreen* for an automatic reversal, based upon structural error, is
25 unavailing.

1 Even if error, and structural, the petitioner would still have to demonstrate actual
2 and substantial prejudice. For example, a violation of the right to an open courtroom under
3 Washington Constitution art. I, § 22 and *State v. Bone–Club*, 128 Wn.2d 254, 258–59, 906
4 P.2d 325 (1995) is structural error. See *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126
5 (2012). However, in a PRP, the petitioner still has to show actual and substantial prejudice.
6 See *In re Personal Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014) and *In*
7 *re Personal Restraint of Speight*, 182 Wn.2d 103, 107, 340 P.3d 207 (2014) (plurality
8 opinions).

9 Any alleged error in applying CrR 6.4(e) in this case is trial error, not constitutional
10 error. Therefore, in his PRP, the petitioner has the burden to show that it was “a
11 fundamental defect resulting in a complete miscarriage of justice.” *In re Personal*
12 *Restraint of Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013). He fails to do so. Here, the
13 court never even “denied” the petitioner his eighth peremptory challenge. The petitioner is
14 arguing the type of “meticulous observance of state procedural prescriptions” rejected in
15 *Rivera*.

16 The petitioner argues that the State cannot show harmless error. However, on
17 collateral review the burden shifts. *In re Personal Restraint of Brockie*, 178 Wn.2d 532,
18 539, 309 P. 3d 498 (2013), citing *In re Personal Restraint of Hagler*, 97 Wn.2d 818, 825–
19 826, 650 P.2d 1103 (1982). It is the defendant who has the burden; and must show actual
20 and substantial prejudice. *Id.* Therefore, there is no harmless error analysis. If a
21 constitutional error is subject to harmless error analysis on direct appeal, that same error
22 alleged in a PRP must be shown to have caused actual and substantial prejudice in order
23 for the petitioner to obtain relief. *Brockie*, at 539.

24 In *Brockie*, the Supreme Court also pointed out that actual prejudice is determined
25 “in light of the totality of circumstances.” *Id.*, quoting *In re Personal Restraint of Music*,

1 104 Wn.2d 189, 191, 704 P.2d 144 (1985). Those circumstances include “the jury
2 instructions given, the arguments of counsel, weight of evidence of guilt, and other
3 relevant factors.” *Id.* Here, as detailed in the argument above, the totality of the
4 circumstances includes overwhelming, uncontroverted evidence that the petitioner, who
5 was 24 years old, had sexual intercourse at his apartment with BL, a twelve-year-old girl.
6 The petitioner cannot demonstrate prejudice.

7 At most, the court’s “error” here was an oversight in miscounting how many
8 peremptory challenges had been exercised by the parties. Neither of the parties objected or
9 brought it to the court’s attention. The petitioner was certainly aware of issues regarding
10 peremptory challenges in his trial. In fact, the primary issue in his direct appeal was
11 regarding peremptory challenges: whether the State’s challenges violated *Batson v.*
12 *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *See Meredith*, 178 Wn.2d
13 180. The petitioner neither preserved the “ordinary” peremptory issue for appeal in the trial
14 court, nor did he raise it in his direct appeal. In this PRP, he fails to clearly show error,
15 much less constitutional error, nor actual, substantial prejudice. Neither does he show a
16 fundamental defect resulting in a complete miscarriage of justice.

17 4. THE NUMBER AND EXERCISE OF PEREMPTORY
18 CHALLENGES IN THIS CASE.

19 James Schacht was the prosecuting attorney in this trial. Based upon his records
20 and notes from the trial, he has filed a declaration regarding the number and exercise of
21 peremptory challenges in this case. *See* Appendix K. Mr. Schacht confirms that a total of
22 14 peremptory challenges were exercised by both sides. *Id.* The defense exercised
23 peremptory challenges on Jurors 2, 3, 5, 7, 12, 27, and 33. *Id.* The State exercised
24 peremptory challenges on Jurors 4, 6, 18, 19, 28, 29, and 31. *Id.*
25

1 The petitioner now asserts that, if given the additional peremptory challenge, he
2 would have challenged one of Jurors 11, 14, or 16. Pet. Reply, at 2. Juror 16 was later
3 designated by random an alternate, and did not deliberate to a verdict. 6 RP 601. Where the
4 petitioner chose not to challenge Jurors 11, 14, and 16; but instead excused three other
5 jurors, he cannot show that he was actual prejudice or complete miscarriage of justice by
6 the absence of his eighth peremptory challenge.

7 The petitioner and his attorney exercised their best judgment in exercising their
8 peremptory challenges. After jurors were excused for cause and peremptory challenges,
9 defense counsel signed the jury selection sheet. Appendix C. This is evidence that the party
10 has ratified, or is satisfied with, the jury selection process, or at least an acknowledgement
11 of how the composition of the jury was arrived at. It is evidence that, after exercising seven
12 peremptory challenges, the defense decided not to exercise its last one.

13 The petitioner, through trial counsel Mr. Purtzer, now claims what he never did at
14 trial or in his direct appeal; that he was denied an eighth peremptory challenge. He tries to
15 create an issue and argument through speculation. Jury selection involves strategy and
16 planning. Parties must not only exercise their judgement as to their own peremptory
17 challenges, they must decide whether to use a challenge on a particular juror or wait to see
18 if the other side challenges that juror. Parties must view the panel and decide whether to
19 hold a challenge in reserve in case a less-desirable juror, far deep in the venire, ends up in
20 the 14 jurors the court is permitting. The record does not prove the petitioner's claim here,
21 nor does the affidavit of his attorney.

22 D. CONCLUSION:

23 The courts have frequently observed that a PRP is not a substitute for an appeal.
24 See e.g. **Brockie**; and **Hagler**, *supra*. The Supreme Court has "recognized that the writ of
25 habeas corpus cannot be allowed to deteriorate into a writ of appeal allowing a petitioner

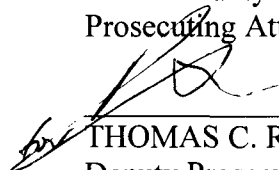
1 "to institute appeal upon appeal and review upon review in forum after forum ad
2 infinitum." *Hagler*, at 826; *see also Gentry, supra*. All of the issues raised in this portion
3 of the PRP were known, could and should have been raised in the direct appeal. This PRP
4 illustrates the type of piecemeal appellate litigation that the appellate courts disapprove of.

5 The petitioner fails to demonstrate deficiency of counsel or resulting prejudice even
6 if counsel was deficient. The petitioner also fails to show a constitutional violation in the
7 prosecuting attorney's closing argument resulting in actual and substantial prejudice. The
8 petitioner speculates on the results of what was at most an oversight by the court and both
9 counsel regarding the number of peremptory challenges allowed and exercised.

10 The State respectfully requests that this PRP be denied.

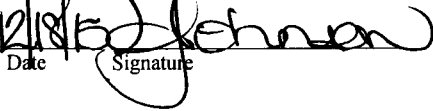
11 DATED: December 18, 2015

12 MARK LINDQUIST
13 Pierce County
Prosecuting Attorney

14  33336
15 THOMAS C. ROBERTS
16 Deputy Prosecuting Attorney
WSB # 17442

17 Certificate of Service:

18 The undersigned certifies that on this day she delivered by U.S. mail or
19 ABC-LMI delivery to the petitioner true and correct copies of the document to
20 which this certificate is attached. This statement is certified to be true and
correct under penalty of perjury of the laws of the State of Washington. Signed
at Tacoma, Washington, on the date below.

21 
Date Signature

APPENDIX “J”

Slip Opinion—38600-3

163 Wash.App. 75
Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
Gary D. MEREDITH, Appellant.

No. 38600-3-II. | Aug. 9, 2011.

Synopsis

Background: Defendant was convicted by jury in the Superior Court, Pierce County, Vicki Hogan, J., of second degree child rape and communicating with a minor for immoral purposes. Defendant appealed.

Holdings: The Court of Appeals, Penoyar, C.J., held that:

[1] defendant's mere assertion that prosecutor's exercise of peremptory challenge against sole African American venire member evidenced purposeful discrimination, without something more, did not establish purposeful discrimination, for *Batson* purposes, and

[2] trial court error in applying wrong legal standard in analyzing defendant's *Batson* challenge did not require reversal of convictions.

Affirmed.

Johanson, J., dissented, with opinion.

Attorneys and Law Firms

****325** James Elliot Lobsenz, Carney Badley Spellman, Seattle, WA, for Appellant.

Kathleen Proctor, Pierce County Prosecuting Atty. Ofc., Tacoma, WA, for Respondent.

OPINION PUBLISHED IN PART

PENoyAR, C.J.

***707** ¶ 1 Gary D. Meredith appeals his convictions for second degree child rape and communicating with a minor for immoral purposes. His primary contention is that the prosecutor's peremptory challenge of the sole African American venire member constituted a prima facie case of purposeful discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In the published part of this opinion, we review the facts relevant to his *Batson* claim and hold that a defendant does not establish a prima facie case of purposeful discrimination under *Batson* by showing only that the prosecutor peremptorily challenged the sole venire member of a cognizable racial group that is different from the defendant's racial group. We also conclude that Meredith failed to establish a prima facie case of purposeful discrimination here.

¶ 2 Meredith also argues that (1) the trial court violated his rights to confrontation and cross-examination, (2) insufficient evidence supports his communication with a minor for immoral purposes conviction, and (3) the trial ****326** court improperly prohibited him from arguing about the absence of DNA ¹ evidence during closing argument. In the unpublished portion of this opinion, we discuss the facts relevant to these claims, each of which we reject. Accordingly, we affirm on both counts.

PUBLISHED FACTS

¶ 3 In 1996, Meredith was preparing to stand trial on one count of second degree child rape² and one count of communication with a minor for immoral purposes.³ During ***708** voir dire, the prosecutor peremptorily challenged juror 4, the sole African American on the venire. Meredith, who is Caucasian, objected, arguing that the State did not give a basis for challenging juror 4 and, thus, the "only belief can be that she was removed because of her minority status." III Report of Proceedings (RP) at 107.

¶ 4 The prosecutor responded that Meredith had failed to meet his burden under *Batson* to show purposeful discrimination because he failed to present any evidence for this claim other than that juror 4 was African American. Additionally, the prosecutor maintained that he did not strike other racial minorities on the venire, including one woman who appeared to be of "Southern European descent ... or perhaps even Middle Eastern." III RP at 109. He observed that the juror questionnaires did not include information on the venire

members' race, "so it's difficult to know who is and is not a racial minority." III RP at 109. The prosecutor further argued that, as the "other half of the *Batson* challenge" requires, Meredith failed to meet his burden of proof that he was of the same race as the excluded venire member. III RP at 109.

¶ 5 The trial court agreed with the prosecutor that removing the sole African American venire member was insufficient to establish a prima facie case of purposeful discrimination under *Batson*:

At this point in time, the Court finds that the burden of proof is on the Defendant to demonstrate the use of a peremptory challenge based on a discriminatory reason. Defense has failed in that proof, one, as to whether or not the Prosecuting Attorney's Office here in Pierce County exercises challenges in a racially biased or discriminatory manner, or two, that ... [the] prosecutor in this case has done so. There is no evidence of racial bias in challenging Juror No. 4 on either of those two bas[es].

The fact that there has been an exclusion of a single black juror is insufficient to establish a prima facie case pattern of *709 exclusion. This is under *Batson* and under *State v. Ashcroft* [*Ashcroft*],^[4] even though from appearances she was the ONLY BLACK OR AFRICAN American juror on the panel. There being no other evidence, the Court denies the motion.

III RP at 111. Accordingly, the trial court did not require the prosecutor to provide a race-neutral reason for challenging juror 4.

¶ 6 The jury convicted Meredith on both counts. He appeals.

PUBLISHED ANALYSIS

Batson Challenge

[1] ¶ 7 We must decide whether Meredith established a prima facie case of purposeful discrimination under *Batson* by showing that the prosecutor removed the only African American venire member. We hold that he did not.

[2] ¶ 8 In *Batson*, the United States Supreme Court recognized that the Fourteenth Amendment's equal protection clause requires defendants to be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." 476 U.S. at 85-86, 106 S.Ct. 1712 (citing *Martin v. Texas*,

200 U.S. 316, 321, 26 S.Ct. 338, 50 L.Ed. 497 (1906)). *Batson* articulated a three-part analysis to determine whether discriminatory **327 criteria were used to peremptorily challenge a venire member. 476 U.S. at 96-98, 106 S.Ct. 1712. First, the defendant must establish a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 96-97, 106 S.Ct. 1712. To establish a prima facie case, the defendant must provide evidence of any relevant circumstances that raise an inference that a peremptory challenge was used to exclude a venire member from the jury on account of his or her race. *Batson*, 476 U.S. at 96-97, 106 S.Ct. 1712. Second, if the defendant establishes this prima facie case, the burden shifts to the prosecutor to articulate a race-neutral explanation for challenging *710 the venire member. *Batson*, 476 U.S. at 97, 106 S.Ct. 1712. Finally, the trial court must determine whether the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98, 106 S.Ct. 1712.

[3] ¶ 9 "In reviewing a trial court's ruling on a *Batson* challenge, [t]he determination of the trial judge is accorded great deference on appeal, and will be upheld unless clearly erroneous." *State v. Hicks*, 163 Wash.2d 477, 486, 181 P.3d 831 (2008) (internal quotation marks omitted) (quoting *State v. Luvene*, 127 Wash.2d 690, 699, 903 P.2d 960 (1995)).

¶ 10 Meredith argues that our Supreme Court's recent decision in *State v. Rhone*, 168 Wash.2d 645, 229 P.3d 752 (2010), cert. denied, U.S. 131 S.Ct. 522, 178 L.Ed.2d 385 (2010), created a bright-line rule in Washington that a defendant establishes a prima facie case of purposeful discrimination when the record shows that the prosecutor exercised a peremptory challenge against the sole remaining venire member of a constitutionally cognizable racial group. Because the prosecutor challenged the only African American venire member in the present case, Meredith concludes that he established a prima facie case of purposeful discrimination. He asserts that the trial court erred in determining otherwise, and he asks us to reverse his convictions and remand for a new trial.

¶ 11 In *Rhone*, there were two African Americans in the venire. 168 Wash.2d at 648, 229 P.3d 752. One was challenged for cause per the parties' agreement, and the other was removed by one of the prosecutor's peremptory challenges without an objection by the defense. *Rhone*, 168 Wash.2d at 648, 229 P.3d 752. After the jury was sworn in, the defendant, an African American, raised a *Batson* challenge. *Rhone*, 168 Wash.2d at 648-49, 229 P.3d 752. The trial court

ruled that the defendant had failed to establish a prima facie case of purposeful discrimination. *Rhone*, 168 Wash.2d at 650, 229 P.3d 752.

***711** ¶ 12 In *Rhone*'s lead opinion, four justices⁵ rejected a bright-line rule that a prima facie case of discrimination is always established whenever the prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group. 168 Wash.2d at 652-53, 229 P.3d 752. They noted that *Batson* involved a three-part analysis, in which the first part directs a trial court "to determine whether 'something more' exists than a peremptory challenge of a member of a racially cognizable group." *Rhone*, 168 Wash.2d at 653, 229 P.3d 752. Consequently, they explained:

Adopting a bright-line rule would negate this first part of the analysis and require a prosecutor to provide an explanation every time a member of a racially cognizable group is peremptorily challenged. Such a rule is beyond the intended scope of *Batson*, transforming a shield against discrimination into a sword cutting against the purpose of a peremptory challenge.

Rhone, 168 Wash.2d at 653-54, 229 P.3d 752.

¶ 13 Chief Justice Madsen wrote a separate concurrence, stating, "I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent." *Rhone*, 168 Wash.2d at 658, 229 P.3d 752 (Madsen, C.J., concurring).

¶ 14 The dissent, which Justice Alexander⁶ authored, advocated "a bright line rule that a prima facie case of discrimination is established under *Batson* when the sole remaining venire member of the defendant's constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged." ****328** *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting). The dissenters recognized that, under an earlier precedent,⁷ a trial court has discretion to find a prima facie case of purposeful discrimination where the only venire member from a constitutionally ***712** cognizable group is peremptorily challenged; however, the dissenters were persuaded to depart from this precedent because "the benefits of [a bright-line rule] far outweigh the State's minimal burden to provide a race-neutral explanation for its challenge during venire." *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting). Some of these benefits include ensuring an adequate record for appellate review, accounting for the realities of the demographic composition

of Washington venires, and effectuating the Washington Constitution's elevated protection of the right to a fair jury trial. *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting).

¶ 15 *Rhone*'s future is uncertain now that a new justice has joined our Supreme Court. Other *Batson* cases in the future will present different facts, different challenges, and different results. In any case, we need not consider the reach of the bright-line rule advocated by *Rhone*'s minority/possible future majority because the record here is inadequately developed to tell us with any certainty whether this case even falls within that rule.

¶ 16 First, although the challenged venire member in this case was African American, Meredith is not. Thus, under the first prong of the minority/possible future majority's bright-line rule, Meredith's claim falls short because the peremptorily challenged juror was not a "member of the *defendant's* constitutionally cognizable racial group." See *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting) (emphasis added). And under the minority/possible future majority's second prong, Meredith fails again because the record does not clarify whether juror 4 was, in fact, the last remaining minority member of the venire. See *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting). For instance, the prosecutor pointed out that at least one of the remaining venire members appeared to be a racial minority.

[4] ¶ 17 Turning to *Rhone*'s majority/possible future minority opinion, we conclude that it also does not support Meredith's claim that he established a prima facie case of ***713** purposeful discrimination. Under that opinion's analysis, to determine whether a defendant has established a prima facie claim of purposeful discrimination, the trial court must look to see whether the record reflects "something more" than "a peremptory challenge against a member of a racially cognizable group." *Rhone*, 168 Wash.2d at 656, 229 P.3d 752. Some factors to consider in determining whether there was purposeful discrimination include:

- (1) [S]triking a group of otherwise heterogeneous venire members who have race as their only common characteristic,
- (2) exercising a disproportionate use of strikes against a group,
- (3) the level of a group's representation in the venire as compared to the jury,
- (4) the race of the defendant and the

victim, (5) past discriminatory use of peremptory challenges by the prosecuting attorney, (6) the type and manner of the prosecuting attorney's questions during voir dire, (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and (8) similarities between those individuals who remain on the jury and those who have been struck.

Rhone, 168 Wash.2d at 656, 229 P.3d 752.

¶ 18 Although this is not an exhaustive list of factors that a court may consider in deciding whether “something more” exists, Meredith did not argue to the trial court that any of these factors were present. Instead, he argued that nothing in juror 4's answers indicated “that she was in any way confused, evasive or said anything that might lead one to believe that there would be a proper basis for removing the juror.” III RP at 107. We hold that *714 this alone is not “something more” under *Rhone*. And without this “something more” a court will not ascribe discriminatory motives to the challenge. We recognize that there are a host of other factors, any one of **329 which may determine a trial attorney's choice to remove a venire member, including the tone and inflections in a venire member's voice, as well as non-verbal cues, including eye contact, body gestures, reactions to other venire members' responses, et cetera. In sum, the record does not reflect any discriminatory motive in removing juror 4, nor does it exclude the existence of many potential non-discriminatory motives. Thus, we hold that the trial court did not err by concluding that Meredith did not meet his burden to show a prima facie case of purposeful discrimination.

[5] [6] ¶ 19 Finally, we agree with the dissent that a defendant may rely on “[a] single invidiously discriminatory governmental act” to establish a prima facie case of purposeful discrimination. Dissent at 1 (quoting *Batson*, 476 U.S. at 95, 106 S.Ct. 1712). We *715 agree, therefore, that the trial court applied the wrong legal standard when it concluded that Meredith had to demonstrate “a pattern of exclusion” in order to establish a prima facie case of purposeful discrimination. III RP at 111. But this error does not warrant reversal of Meredith's convictions because, as we explain in the preceding paragraphs, Meredith failed to establish a prima facie case of purposeful discrimination under both the *Rhone* majority's “something more” standard and the *Rhone* minority's bright-line rule. Accordingly,

although the trial court applied an incorrect legal standard, its determination with regard to Meredith's *Batson* challenge was not clearly erroneous.

¶ 20 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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UNPUBLISHED FACTS

¶ 21 At trial, the State presented testimony from four teenage girls regarding their contact with Meredith. The State alleged that BL was the rape victim and that AB was the victim of communication with a minor for immoral purposes.

¶ 22 About two weeks before BL (age 12)⁸ was raped, AB (age 13) met Meredith. During those two weeks, Meredith talked daily with AB by phone. Meredith told AB that he was 17 years old, when in reality he was 24 years old. At one point, Meredith told AB that he liked her, but AB reported that she did not think much of his feelings because, as she had told him, she already had a boyfriend.

¶ 23 On the night of October 28, 1994, AB, BL, and ST (age 13) stayed the night at MJ's (age 13) house. AB spoke to Meredith. Meredith said that he wanted to meet AB's friends.

¶ 24 The next day, the four girls met Meredith and his friend, Jason Gross, and the group went to the mall. Afterward, Gross and Meredith dropped the girls off near MJ's house. AB arranged to meet Meredith again that same evening. AB and the three other girls met Meredith and Gross near BL's house that evening, and Gross drove everyone to Meredith's apartment, stopping on the way to buy some alcohol.

¶ 25 Once inside Meredith's apartment, all four girls consumed varying amounts of alcohol. MJ and BL reported that they felt intoxicated. BL started feeling sick, so she went into a bedroom to lie down. Meredith followed her into the bedroom and closed the door.

¶ 26 MJ testified that at some point after BL and Meredith went into the bedroom, ST opened the bedroom door and MJ

saw Meredith lying on top of BL. According to MJ, both were naked and “it looked like [Meredith] was on top of [BL] and they were both moving.” III RP at 152. AB also testified that, on a separate occasion, she opened the door and saw Meredith on top of BL, who was naked. They had a sheet on top of them and Meredith was moving around “[a] little bit.” V RP at 388.

¶ 27 BL testified that she did not remember Meredith entering the room with her, but she did remember waking up with him lying next to her in the bed. BL testified that Meredith took her clothes off and asked her if she wanted to have sex. She pushed him away and said that she needed to sleep. Meredith then took his clothes off and got on top of BL. BL was “halfway passed out” and again tried pushing him away, but Meredith began having vaginal intercourse with her. IV RP at 279.

¶ 28 When BL saw her mother later that evening, her mother sensed that something was wrong, and she asked BL if someone had nonconsensual sex with her. BL said yes. BL's mother then drove BL to MJ's house; MJ's mother called the police to report the incident.

¶ 29 BL's mother took BL to the hospital where staff conducted a sexual assault examination. Michelle Russell, a registered nurse, inspected BL's skin with a blue light to look for secretions but did not find anything. Dr. Bobbi Sipes inspected BL's vagina, noting a “pooling of secretions” consistent with semen in the back portion of her vagina. VI RP at 498. She also saw redness on BL's thigh and a superficial laceration in the area between BL's vagina and anus. Dr. Sipes testified that the redness and laceration were inflicted within 24 hours of BL's exam. The pooled secretions, redness, and laceration were consistent with “non-specific findings for intercourse.” VI RP at 500. BL told Dr. Sipes that, before having sexual intercourse with Meredith, the last time she had sexual intercourse was in July.

¶ 30 Dr. Sipes also took swabs from BL's vagina and sent them to the hospital lab. Dr. Sipes testified that the hospital lab report stated that the secretion in BL's vagina contained semen with nonmotile sperm. Dr. Sipes testified that the presence of semen supported the conclusion that BL had intercourse within three days of her examination.

I. Right to Confrontation

¶ 31 Meredith argues that the trial court violated his right to confrontation when it allowed Dr. Sipes to testify about the contents of a lab report that she did not author. Before trial, Meredith moved in limine to preclude this testimony. He argues, as he did below, that Dr. Sipes's testimony that the report found semen with nonmotile sperm violated his right to confrontation because she did not conduct the lab analysis that identified the semen.

¶ 32 Under the Sixth Amendment's confrontation clause, an accused has a right to confront witnesses against him. U.S. Const. amend. VI; *see also Crawford v. Washington*, 541 U.S. 36, 42, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness, the confrontation clause prohibits admission of the witness's “testimonial” statements when that witness does not take the stand at trial. *Crawford*, 541 U.S. at 59, 124 S.Ct. 1354.

¶ 33 A confrontation clause error may be harmless. *State v. Mason*, 160 Wash.2d 910, 927, 162 P.3d 396 (2007). To determine whether such an error is harmless, we apply the “overwhelming untainted evidence” test. *Mason*, 160 Wash.2d at 927, 162 P.3d 396 (quoting *State v. Davis*, 154 Wash.2d 291, 305, 111 P.3d 844 (2005)). Under this test, we look only at the untainted evidence to determine whether it is so overwhelming that it necessarily leads to a finding of guilt. *Davis*, 154 Wash.2d at 305, 111 P.3d 844.

¶ 34 Assuming, without deciding, that the lab report was “testimonial,” we conclude that the error was harmless. Excluding the lab report's statement that BL's vagina contained semen with nonmotile sperm, the untainted evidence against Meredith included Dr. Sipes's conclusion that BL had recently had intercourse (including her personal observation of secretions that appeared to be semen in BL's vagina) and testimony from BL and other eyewitnesses that Meredith had sexual intercourse with BL.

¶ 35 Specifically, Dr. Sipes testified that her observations from BL's sexual assault exam were consistent with “non-specific findings for intercourse.” VI RP at 500. These observations included redness on BL's thigh and a superficial laceration in the area between BL's vagina and anus, both of which, according to Dr. Sipes, were inflicted within 24 hours of BL's exam. Further, Dr. Sipes testified that she found a pooling of secretions consistent with semen inside the back portion of BL's vagina. According to Dr. Sipes, the presence

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of what appeared to be semen supported the conclusion that BL had intercourse within three days of her examination.

¶ 36 Three of the four girls who went to Meredith's apartment testified that BL and Meredith were alone in his bedroom for a period of time. AB and MJ both testified that they saw Meredith on top of BL, who was naked, engaging in what looked like sexual intercourse. BL also testified that Meredith climbed on top of her and had sexual intercourse with her.

¶ 37 Accordingly, the record contains overwhelming untainted evidence supporting the jury's verdict of guilt beyond a reasonable doubt with respect to the second degree child rape charge. Even without the lab report findings that BL's vagina contained semen with nonmotile sperm, the evidence that Meredith had sexual intercourse with BL is so overwhelming that it necessarily leads to a finding of guilt.

II. Trial Court's Limitation of Scope of Cross-Examination

A. B.L.'s Behavior During a Court Recess

¶ 38 Meredith next argues that the trial court violated his Sixth Amendment right to cross-examination when it prohibited him from asking BL about her laughing and giggling during a court recess.⁹ He maintains that the purpose of such testimony would have been to cast doubt on the veracity of BL—who appeared teary and distraught while testifying—and to suggest that her courtroom testimony was fabricated.

¶ 39 We agree with Meredith that cross-examining BL about her recess behavior would have had some tendency to make her testimony less credible. *See* ER 401. The State argues that BL's recess behavior “[was] not necessarily indicative of lying while under oath” but that misapprehends the relevancy standard. Br. of Resp't at 24. We hold that the trial court erred by limiting Meredith's cross-examination into BL's behavior. Nonetheless, as the analysis in the previous section demonstrates, this error was harmless beyond a reasonable doubt.

B. Blue Light Tests

¶ 40 Meredith next argues that the trial court violated his right to cross-examination when it prohibited him from asking Russell, the registered nurse who conducted the blue light tests, whether secretions are usually present on the outside

of the victim's body in sexual assault cases.¹⁰ Assuming, without deciding, that the trial court erred by disallowing this testimony, we hold that such error was harmless. As discussed above, there was overwhelming evidence of rape, including strong evidence of bodily secretions and eyewitness reports of the sexual encounter.

C. Purpose Behind Collecting Vaginal Swabs

¶ 41 Relying on *State v. Gefeller*, 76 Wash.2d 449, 458 P.2d 17 (1969), Meredith next argues that the trial court erred by prohibiting him from asking Russell and Dr. Sipes whether the purpose of the vaginal swabs was to conduct a DNA analysis.¹¹

¶ 42 In *Gefeller*, the defendant asked a police officer on cross-examination whether the defendant had taken a lie detector test and whether the defendant had been cooperative during the test. 76 Wash.2d at 454, 458 P.2d 17. After the officer responded “yes” to both questions, the defendant asked about the test results. *Gefeller*, 76 Wash.2d at 454, 458 P.2d 17. The officer responded that the results were inconclusive. *Gefeller*, 76 Wash.2d at 454, 458 P.2d 17. On redirect, the State asked the officer what he meant by inconclusive results, and, on re-cross, the defendant asked about the officer's experience and education with lie detector tests. *Gefeller*, 76 Wash.2d at 454–55, 458 P.2d 17. On appeal, the defendant argued that the trial court improperly admitted evidence that he had taken a lie detector test and that the results had been inconclusive. *Gefeller*, 76 Wash.2d at 454, 458 P.2d 17. Our Supreme Court rejected this argument, noting that the defendant had opened the door to this testimony by “first asking whether [a lie detector test] had been given and whether the defendant had been cooperative concerning it.” *Gefeller*, 76 Wash.2d at 455, 458 P.2d 17. As the *Gefeller* court explained, “[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.” *Gefeller*, 76 Wash.2d at 455, 458 P.2d 17. The court further explained, “It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.” *Gefeller*, 76 Wash.2d at 455, 458 P.2d 17.

¶ 43 Meredith contends that the State wanted to elicit evidence showing that the lab found evidence consistent with his guilt—semen with nonmotile sperm—when it examined

the vaginal swabs, but it “did not want the defense to be able to elicit testimony that an additional exam—DNA testing—could have resolved whether the sperm was the defendant's or someone else's.” Br. of App. at 48. He maintains that this is exactly the type of unfairness that *Gefeller* was trying to prevent, i.e. allowing one party to bring up a subject and bar the other party from inquiring about it.

¶ 44 **Meredith's** argument assumes that the lab report's only purpose was DNA related. The lab report, however, supports the conclusion that BL had sexual intercourse, whereas a DNA analysis would address the *identity* of the person with whom BL had sexual intercourse. The trial court did not prohibit **Meredith** from asking questions about the lab report's finding of semen. Instead, the trial court limited **Meredith** from opening a *new door* about why the State did not have DNA evidence. But even if the trial court erred in prohibiting testimony about the purpose of the vaginal swabs, the error was harmless beyond a reasonable doubt, as we explained above.

III. Sufficiency of Evidence Regarding Communication with a Minor for Immoral Purposes

¶ 45 **Meredith** next argues that insufficient evidence supported his conviction of communication with a minor for immoral purposes. In a sufficiency challenge, we review the evidence in the light most favorable to the State. *State v. Drum*, 168 Wash.2d 23, 34, 225 P.3d 237 (2010). We ask “ ‘whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.’ ” *Drum*, 168 Wash.2d at 34–35, 225 P.3d 237 (quoting *State v. Wentz*, 149 Wash.2d 342, 347, 68 P.3d 282 (2003)). An appellant claiming insufficient evidence necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Drum*, 168 Wash.2d at 35, 225 P.3d 237. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980).

¶ 46 **Meredith** argues that the statute criminalizing communication with a minor for immoral purposes has a temporal component such that the defendant's immoral sexual purpose must be present at the time that the defendant makes the prohibited communication. At the time of **Meredith's** offense, the statute stated in relevant part:

A person who communicates with a minor for immoral purposes is guilty of a gross misdemeanor.

Former RCW 9.68A.090 (1989).

¶ 47 **Meredith** contends that the State used evidence of him having sex with BL to show that his earlier communication with AB—which did not include any specific words or conduct referring to sex—was for an immoral purpose. He asserts that talking, walking, eating, drinking, and partying with AB was not sufficient evidence to show that his communication with her was for an immoral purpose; the purpose to have sex with BL, **Meredith** contends, may not have developed until the girls were at his apartment and BL decided to go into his bedroom.

¶ 48 **Meredith**, a 24-year-old man, communicated daily with AB, a 13-year-old girl; told her that he was 17 years old; expressed interest in AB by saying that he liked her; asked to meet her friends; transported AB and her friends to his apartment; purchased alcohol and allowed the underage girls to consume it in his apartment; and, finally, followed BL into his bedroom when she was intoxicated and had sexual intercourse with her. Although a man does not necessarily intend to have sex with every girl he dines and drinks with, the facts here are anything but innocuous. Based on this evidence, the jury could have reasonably inferred that **Meredith's** purpose in communicating with AB was immoral even if his decision to have sexual intercourse with BL did not arise until after his communications with AB.

IV. Closing Argument

¶ 49 The last question is whether the trial court improperly prohibited **Meredith** from arguing the lack of DNA evidence during closing argument. At trial, the State moved to prohibit **Meredith** from mentioning the absence of DNA testing in his closing argument, and the trial court granted the motion. The State concedes error but maintains that the error was harmless.

¶ 50 During closing argument, a criminal defendant has a final opportunity to “persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.” *State v. Perez-Cervantes*, 141 Wash.2d 468, 474, 6 P.3d 1160 (2000) (quoting *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)). The defendant must be afforded “ ‘the utmost freedom in the argument of the case’ ” and “ ‘some latitude in the discussion of [his or her] causes before the jury.’ ” *Perez-Cervantes*, 141 Wash.2d at 474, 6 P.3d 1160 (quoting *Sears v. Seattle Consol. St. Ry. Co.*, 6 Wash. 227, 232–33, 33 P. 1081 (1893)). Trial courts “

'cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical.' " *State v. Frost*, 160 Wash.2d 765, 772, 161 P.3d 361 (2007) (quoting *City of Seattle v. Arensmeyer*, 6 Wash.App. 116, 121, 491 P.2d 1305 (1971)).

¶ 51 Nonetheless, the trial court possesses broad discretionary powers over the scope of the defendant's closing argument. *Frost*, 160 Wash.2d at 771-72, 161 P.3d 361. The defendant must restrict argument to the facts in evidence and the applicable law; otherwise the jury may be confused or misled. *Perez-Cervantes*, 141 Wash.2d at 474, 6 P.3d 1160. We review rulings to restrict the scope of closing arguments for abuse of discretion. *Perez-Cervantes*, 141 Wash.2d at 475, 6 P.3d 1160.

¶ 52 Although it is possible that the trial court erred in limiting the scope of Meredith's closing argument, we conclude that the error was harmless under the "overwhelming untainted evidence" test. *See Frost*, 160 Wash.2d at 782, 161 P.3d 361 (applying this test to trial court's erroneous limitation of the scope of the defense's closing argument).

¶ 53 We hold that the defendant did not establish a prima facie case of discrimination under *Batson* and *Rhone*. Furthermore, despite any perceived shortcomings in the proceedings below, we hold that any errors related to Meredith's other claims were harmless beyond a reasonable doubt. We affirm.

End of Unpublished Text

We concur: HUNT, J.

JOHANSON, J. (dissenting).

¶ 21 I respectfully dissent for two reasons. First, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), does not require a pattern of racial discrimination. And, second, I agree with Justice Alexander's conclusion in his dissent in *State v. Rhone*, 168 Wash.2d 645, 659, 229 P.3d 752, cert. denied, ___ U.S. ___, 131 S.Ct. 522, 178 L.Ed.2d 385 (2010) (Alexander, J., dissenting), that there should be a bright-line rule "that a defendant establishes a prima facie case of discrimination when, as here, the record shows that the State exercised a peremptory challenge against the sole remaining venire member" of a specific racial group.

¶ 22 *716 As to my first reason, the record shows that the trial court clearly applied the wrong standard articulated in

Batson, 476 U.S. at 95, 106 S.Ct. 1712. Under *Batson*, "a consistent pattern of official racial discrimination" is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " *Batson*, 476 U.S. at 95, 106 S.Ct. 1712 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n. 14, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). *Batson* replaced the previous "threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation." *Miller-El v. Dretke*, 545 U.S. 231, 236, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

¶ 23 Under these rules, the trial court's ruling here is clearly erroneous. The trial court held that "[t]he fact that there has been an exclusion of a single black juror is insufficient to establish a prima facie case *pattern of exclusion*." 3 Verbatim Report of Proceedings (VRP) at 111 (emphasis added). But as Justice Alexander noted in his dissent in *Rhone*, "it is clearly inappropriate for a trial court to consider whether the jury selection process involves *systematic exclusion* of venire members based on a discriminatory purpose." *Rhone*, 168 Wash.2d at 660, 229 P.3d 752 (citing *Batson*, 476 U.S. at 95, 106 S.Ct. 1712). Instead, "a 'single invidiously discriminatory governmental act' is sufficient to warrant reversal of a conviction." *Rhone*, 168 Wash.2d at 660, 229 P.3d 752 (quoting *Batson*, 476 U.S. at 95, 106 S.Ct. 1712) (Alexander, J., dissenting). Here, the trial court **330 required Meredith to show systematic discrimination by showing a "pattern of exclusion." 3 VRP at 111. In so doing, the court applied the incorrect standard and, thus, its ruling was clearly erroneous.

¶ 24 My second reason for dissenting is that I would follow Justice Alexander's bright-line rule in *Rhone*: "a *717 prima facie case of discrimination is established under *Batson* when the sole remaining venire member of the defendant's constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged." ¹² *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting). I agree with Justice Alexander that:

Speculation after the fact about whether the State had a discriminatory purpose in exercising a peremptory

challenge is unreliable. The need to speculate can be avoided entirely by requiring the State to provide a short explanation when a defendant raises a *Batson* challenge.

... A bright line rule would provide clarity and certainty concerning the State's obligations in future cases and would simultaneously engender greater fidelity to *Batson* and its equal protection guaranty.

Rhone, 168 Wash.2d at 661–62, 229 P.3d 752 (Alexander, J., dissenting).

¶ 25 I recognize that Justice Alexander's proposed rule suggests that the dismissed juror must be of the same racial group as the defendant and that the majority here emphasizes this aspect of the rule. But in my view, the majority here reads this rule too narrowly by requiring the defendant and struck venire person to share the same race.

¶ 26 It is well settled that a defendant can object to a peremptorily challenged juror even though they do not share the same race. *Powers v. Ohio*, 499 U.S. 400, 406, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Limiting a defendant's right to object “conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law.” *Powers*, 499 U.S. at 406, 111 S.Ct. 1364; accord *Rhone*, 168 Wash.2d at 651 n. 2, 229 P.3d 752 (“The United States Supreme Court has expanded the scope of *Batson*'s basic constitutional rule” to the use of peremptories by prosecutors “where the defendant and the excluded juror *718 are of different races.”).

¶ 27 Additionally, “*Batson* ‘was designed “to serve multiple ends,” ’ only one of which was to protect individual defendants from discrimination in the selection of jurors.” *Powers*, 499 U.S. at 406, 111 S.Ct. 1364 (quoting *Allen v. Hardy*, 478 U.S. 255, 259, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986)). “The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury

system.” *Powers*, 499 U.S. at 406, 111 S.Ct. 1364; see also *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970) (“Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.”).

¶ 28 I believe that a bright-line rule should not be limited to situations where the defendant and the peremptorily challenged juror share the same race. Limiting a bright-line rule in such a manner ignores the realities of the defendant obtaining a cross-section of his community. It also hinders the members of that community from equally participating in our legal system.

¶ 29 The benefit of giving each member of a racially cognizable group a fair opportunity to serve justice far exceeds the State's minimal burden in offering a race-neutral reason. Ensuring that justice is blind to race in selecting a jury pool is the ultimate goal, and a bright-line rule addressing the first prong of the *Batson* analysis should be crafted without considering the defendant's race against the peremptorily challenged juror's race.

****331** ¶ 30 The trial court applied the wrong standard by requiring the defendant to show a pattern of discrimination to establish a *prima facie* case. Alternatively, I would apply Justice Alexander's proposed bright-line rule to situations *719 like this case, in which the defendant does not share the same race as the peremptorily challenged juror.

¶ 31 Based on my disagreement of the majority's *Batson* analysis, I would reverse the convictions.

Parallel Citations

165 Wash.App. 704, 259 P.3d 324

Footnotes

- 1 Deoxyribonucleic acid.
- 2 RCW 9A.44.076.
- 3 Former RCW 9.68A.090 (1989).
- 4 The trial court may have been referring to *State v. Ashcraft*, 71 Wash.App. 444, 859 P.2d 60 (1993).
- 5 Justices Charles Johnson (writing), Susan Owens, James Johnson, and Debra Stephens.
- 6 Justices Richard Sanders, Tom Chambers, and Mary Fairhurst joined.
- 7 *State v. Thomas*, 166 Wash.2d 380, 397, 208 P.3d 1107 (2009).

- 8 We state the ages of the girls at the time of the incident in October 1994.
- 9 After a short recess during BL's testimony, the prosecutor told the trial court that, as BL exited the courtroom, she "ran a virtual gauntlet of the defendant's friends and other supporters which there is a certain amount of name calling, laughing, that sort of activities in the hallway." IV RP at 287. Meredith responded that he had not seen what the prosecutor was describing but had "heard reports exactly opposite ... [that BL] and members of her family and other friends ... are doing these shenanigans." IV RP at 287. When Meredith began his cross-examination of BL, the following exchange took place:
- [Meredith]: [BL], at the break the Court just took, were you laughing and giggling outside the courtroom?
- [BL]: Yes.
- [Prosecutor]: Objection. Relevance.
- THE COURT: Sustained. The jury is instructed to disregard the answer.
- IV RP at 299.
- 10 The following exchange took place when Meredith cross-examined Russell:
- [Meredith]: [Ms.] Russell, with respect to the blue light exam is that for purposes of detecting if there is secretions on the external body?
- [Russell]: Uh-huh (affirmative)
- [Meredith]: You stated there was no finding of that?
- [Russell]: Uh-huh (affirmative)
- [Meredith]: Is it not true often times in a sexual assault exam there will be secretions on the outside of the body?
- [Prosecutor]: Objection. Relevance, not confined to the facts of this case.
- THE COURT: Sustained.
- V RP at 433.
- 11 The following exchange took place when Meredith cross-examined Russell:
- [Meredith]: Are the swabs taken for purposes of making DNA analysis?
- [Prosecutor]: Objection.
- THE COURT: Sustained.
- [Meredith]: Are you aware as to whether or not [the swabs collected] were taken for purposes of DNA analysis? [Prosecutor]: [O]bjection. THE COURT: Sustained.
- V RP at 437-38. The trial court also granted the State's motion to strike Dr. Sipes's testimony that she took the swabs for DNA purposes.
- 12 Justice Madsen did not adopt this bright-line rule in *Rhone*, but she stated that "going forward, [she] agree[d] with the rule advocated by [J. Alexander]." *Rhone*, 168 Wash.2d at 658, 229 P.3d 752 (Madsen, C.J., concurring).

APPENDIX “K”

Affidavit of James Schacht

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5
6 IN THE COURT OF APPEALS
7 OF THE STATE OF WASHINGTON
8 DIVISION II

9 IN RE THE PERSONAL RESTRAINT
10 PETITION OF:

11 GARY MEREDITH,

12 Petitioner.

NO. 46671-6- II

AFFIDAVIT OF JAMES SCHACHT

13
14 STATE OF WASHINGTON)
15 : ss.
16 COUNTY OF PIERCE)

17 The undersigned, being first duly sworn upon oath, deposes and says:

18 1. I am an attorney licensed to practice in the State of Washington and am
19 currently employed by the Pierce County Prosecutor's Office.

20 2. I was the trial prosecutor in this matter in May 1996. I have reviewed the
21 file kept by our office from the trial court proceedings and in particular my notes from jury
22 selection. My jury selection notes include a handwritten, contemporaneous record of the
23 challenges for cause and the peremptory challenges exercised by the State and the defense
24 during jury selection.

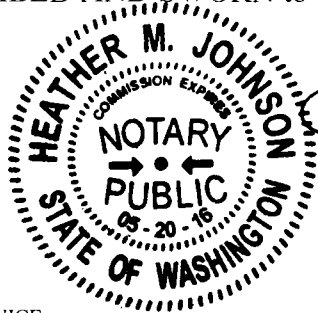
25 3. After review of my jury selection notes, it is my recollection that I exercised
peremptory challenges against jury venire members 4, 6, 18, 19, 28, 29, and 31.

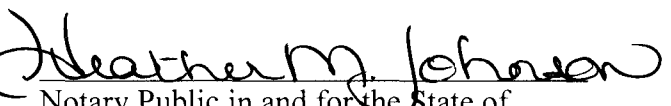
1 Furthermore, it is my recollection that the defense exercised peremptory challenges against
2 jury venire members 2, 3, 5, 7, 12, 27, and 33.

3 Further your affiant sayeth naught.

4
5 
JAMES SCHACHT

6 SUBSCRIBED AND SWORN to before me Thursday, December 18, 2015.

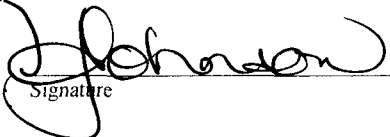


11 
Notary Public in and for the State of
Washington, residing at Dayalla, Wa
My commission expires: 12/20/16

12 CERTIFICATE OF SERVICE:

13 The undersigned certifies that on this day she delivered by U.S. Mail to the petitioner
14 and/or counsel for petitioner, a true and correct copy of the document to which this
15 certificate is attached. This statement is certified to be true and correct under penalty
16 of perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
17 on the date below.

18
19
20
21
22
23
24
25

12/18/15 
Date Signature

PIERCE COUNTY PROSECUTOR

December 18, 2015 - 3:07 PM

Transmittal Letter

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Case Name: In re the PRP of: Gary Meredith

Court of Appeals Case Number: 46671-6

Is this a Personal Restraint Petition? ☒ Yes ☐ No

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Hearing Date(s): _____

Personal Restraint Petition (PRP)

☒ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us